UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LASHUNDA PATRICK,	)	
o/b/o D.L.H., A Minor Child	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 4:05CV1975 ERW(LMB)**
	)	
JO ANNE B. BARNHART,	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

This is a proceeding under 42 U.S.C. § 405(g) for judicial review of the defendant's final decision denying Lashunda Patrick's application for Supplemental Security Income benefits on behalf of her son, D.L.H., under Title XVI of the Social Security Act. This case has been referred to the undersigned United States Magistrate Judge for a Report and Recommendation pursuant to 42 U.S.C. § 636(b). Plaintiff has filed a Brief in Support of Complaint (Document Number 12) and defendant has filed Defendant's Brief in Support of the Answer (Doc. No. 13).

Procedural History

Lashunda Patrick filed an application for Supplemental Security Income (SSI) benefits on behalf of her son, D.L.H., on December 1, 2003. (Tr. 51-53). The application was denied initially and on reconsideration. (Tr. 43-46, 18). Following a hearing held on March 24, 2005, an Administrative Law Judge (ALJ) found that plaintiff was not disabled by a decision dated June 21, 2005. (Tr. 6-17). Ms. Patrick thereafter filed a request for review with the Appeals Council of

the Social Security Administration (SSA). (Tr. 5). The Appeals Council denied Ms. Patrick's request for review on September 8, 2005. (Tr. 2-4). Thus, the decision of the ALJ stands as the final decision of the Commissioner. See 20 C.F.R. §§ 404.981, 416.1481.

Evidence Before the ALJ

A. ALJ Hearing

Plaintiff's administrative hearing was held on March 24, 2005. (Tr. 181). Plaintiff was present and was represented by counsel. (Id.). Plaintiff's mother, Ms. Patrick, was also present. (Id.).

The ALJ first questioned plaintiff, who testified that he was ten years of age. (Id.). Plaintiff stated that he understood the difference between right and wrong. (Id.). Plaintiff testified that he would tell the truth at the hearing. (Id.).

The ALJ then questioned Ms. Patrick, who testified that she applied for child disability benefits on behalf of plaintiff, indicating that he is disabled due to a diagnosis of attention deficit hyperactivity disorder ("ADHD")[1] and a possible diagnosis of bipolar disorder.[2] (Id.). Ms. Patrick stated that she is not alleging any kind of physical disorder. (Tr. 182).

The ALJ stated that she had received additional medical records, which would be added to the record as exhibits. (Tr. 183). Plaintiff's attorney indicated that he had not received copies of these records, although he had reviewed them briefly prior to the hearing. (Id.). The ALJ stated

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[1]A disorder of childhood and adolescence manifested at home, in school and in social situations by developmentally inappropriate degrees of inattention, impulsiveness, and hyperactivity. Stedman's Medical Dictionary, 525 (27th Ed. 2000).

[2]An affective disorder characterized by the occurrence of alternating periods of euphoria and depression. See Stedman's at 526.

that she would allow plaintiff's attorney to copy the records after the hearing. (Id.).

The ALJ questioned Lashunda Patrick, who testified that plaintiff was ten years of age and in the fourth grade. (Tr. 184).

Plaintiff's attorney then examined Ms. Patrick, who testified that she lives with her son and that her son does not have contact with his father. (Tr. 185).

Ms. Patrick stated that plaintiff can read street signs, although he would not be able to catch a bus on his own. (Id.). She testified that plaintiff is unable to identify the amount of change he should receive when he makes purchases. (Tr. 186). Ms. Patrick stated that plaintiff is unable to effectively share information with groups of children. (Tr. 187). She testified that plaintiff becomes distracted when he sets out to complete a task and he tends to forget portions of the information he is told. (Tr. 187). Ms. Patrick stated that she does not give plaintiff multiple-step instructions because plaintiff is unable to remember the instructions. (Tr. 188).

Ms. Patrick testified that plaintiff is responsible for cleaning his room, washing dishes, taking out the trash, and feeding the dog. (Id.). She stated that plaintiff does not remember to take care of the dog and she must constantly remind him of these duties. (Id.). Ms. Patrick testified that plaintiff does not clean his room unless she provides step-by-step instructions. (Tr. 189). She stated that plaintiff does not wash the dishes properly. (Tr. 190). Ms. Patrick explained that plaintiff sometimes is not aware that he has not completed tasks properly and sometimes plaintiff is untruthful. (Id.). She stated that plaintiff tends to blame others when he does not complete tasks properly. (Id.). Ms. Patrick testified that plaintiff is able to complete tasks successfully only when he is fully supervised. (Id.).

Ms. Patrick testified that plaintiff only focuses on television, video games, and the dog. (Tr. 191). She stated that plaintiff enjoys watching cartoons, but he usually cannot watch a complete thirty-minute episode because he becomes distracted. (Id.). Ms. Patrick testified that plaintiff can play video games all day if permitted to do so. (Tr. 191-92). She explained that plaintiff will play video games from the time he wakes up in the morning until about noon, at which time he will watch television for a while, and then continue playing video games the remainder of the day. (Tr. 192). Ms. Patrick stated that the longest period of time plaintiff plays with the dog is about ten minutes. (Id.).

Ms. Patrick testified that plaintiff does not like to do any type of schoolwork or reading. (Id.). She stated that plaintiff only pays attention to his school work for about two minutes if she does not supervise him. (Id.).

Ms. Patrick testified that plaintiff does not get along well with other kids. (Id.). She stated that plaintiff has a cousin who is around the same age as plaintiff. (Id.). Ms. Patrick testified that plaintiff becomes very upset and violent if his cousin wins the game that they are playing. (Id.). She stated that plaintiff will slam things, and try to choke his cousin with the remote control if his cousin wins the game. (Tr. 193).

Ms. Patrick testified that plaintiff gets along better with adults. (Id.). She stated that he will argue with adults but he will not resort to physical violence. (Id.). Ms. Patrick testified that plaintiff is untruthful with adults if he knows his behavior was wrong. (Id.). She stated that prior to the hearing, plaintiff told his attorney's secretary that he had not started spring break even though he knew that he had. (Id.). Ms. Patrick testified that plaintiff understands that he is not

going to school the week after the hearing, but he does not understand that this period is spring break. (Tr. 195-95).

Ms. Patrick testified that she receives reports of plaintiff's behavior on the school bus. (Tr. 195). She stated that the school notifies her when plaintiff stands up on the bus, throws objects, or fights, and warns that plaintiff will be suspended if the behavior continues. (Id.).

Ms. Patrick testified that plaintiff bathes in the morning and in the evening. (Id.). She stated that plaintiff bathes independently, but she has to remind him to do so. (Tr. 196). Ms. Patrick testified that plaintiff tried to iron his own clothes but he stopped doing this because he could not iron properly and left the iron on. (Id.). She stated that this was an issue of plaintiff not obeying the rules rather than plaintiff forgetting the rules. (Id.).

Ms. Patrick testified that plaintiff's appetite has been good since he started taking Risperdal.[3] (Id.).

Ms. Patrick testified that she has concerns about plaintiff's safety. (Id.). For example, Ms. Patrick stated that plaintiff runs into the street to retrieve balls without looking for traffic and cooks without adult supervision. (Tr. 197). Ms. Patrick testified that plaintiff knows the proper way to cross the street, but he does not apply this knowledge. (Id.). She stated that plaintiff is not allowed to walk home from school because he does not pay attention to his surroundings. (Id.). Ms. Patrick testified that plaintiff's school is a mile and a half from his home. (Id.). She stated that other children in plaintiff's class walk home but plaintiff takes the bus. (Id.). Ms.

[3]Risperdal is a psychotropic drug indicated for the treatment of schizophrenia and bipolar disorder. See Physician's Desk Reference (PDR), 1676-77 (61st Ed. 2007).

Patrick testified that when she allowed plaintiff to walk home, he forgot to bring home his book bag because he was playing with his friends. (Tr. 198). She stated that she has observed plaintiff playing with friends and he does not pay attention to his surroundings. (Id.).

Ms. Patrick testified that on one occasion, plaintiff threatened his twelve-year-old step-brother with a knife after losing a video game. (Id.). She stated that this incident occurred several months prior to the hearing. (Tr. 199). Ms. Patrick testified that she talked with plaintiff and told him it was inappropriate to touch knives. (Id.). She stated that plaintiff agreed and apologized for his behavior. (Id.).

Ms. Patrick testified that she took plaintiff to counseling on one occasion after the knife incident. (Id.). She stated that she stopped going to the counselor because she felt that it was not helpful. (Id.). Ms. Patrick testified that the counseling session occurred at a private office. (Tr. 200). She stated that plaintiff takes special education classes in reading and math, which have been helpful to plaintiff. (Id.). Ms. Patrick testified that plaintiff sees a school counselor and a psychiatrist. (Id.). She stated that plaintiff has been seeing psychiatrist Scott Trail about once a month since December of 2003. (Id.). Ms. Patrick testified that Dr. Trail prescribed Adderall[4] and Risperdal. (Id.). She stated that Dr. Trail recently increased the dosage of Risperdal due to plaintiff's mood swings and behavior. (Tr. 200-01). Ms. Patrick explained that plaintiff was not cooperating with his teachers, was getting into fights at school, was not cooperating with her at home, was not sleeping, and was in a bad mood all the time. (Tr. 201).

Ms. Patrick testified that she works at Park Providers as a Certified Nursing Assistant.

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[4]Adderall is an amphetamine indicated for the treatment of ADHD. See PDR at 3164.

(Id.).

The ALJ then examined Ms. Patrick, who testified that she works from 11:00 p.m. to 7:00 a.m. (Id.). She stated that her husband stayed with plaintiff while she worked until she and her husband separated. (Id.). Ms. Patrick testified that her brother currently stays with plaintiff. (Id.). She stated that her brother has been living with her for the past three months, and will continue to live with her until his apartment becomes available. (Id.).

Ms. Patrick testified that she helps plaintiff with his homework, including his multiplication tables, book reports, and spelling words. (Tr. 202). Ms. Patrick testified that plaintiff started taking his ADHD medication in December of 2003 and he started the Risperdal in 2004. (Id.). She stated that he takes these medications every day in the morning and at night. (Id.). Ms. Patrick testified that she wakes plaintiff up in the morning. (Id.). She stated that plaintiff does not get up on his own when his alarm clock goes off. (Tr. 203).

Plaintiff's attorney then examined Ms. Patrick, who testified that the medication list submitted to the ALJ contained an error. (Id.). She stated that her testimony regarding plaintiff's medications was accurate. (Id.).

The ALJ then examined plaintiff, who testified that he would be able to determine the correct change if he were to give money to a cashier at a grocery store. (Tr. 204). Plaintiff stated that he has been working on his multiplication tables with his mother. (Id.). Plaintiff testified that he sometimes does not know his multiplication tables but he is learning them. (Id.).

Plaintiff stated that he has two friends at school, with whom he plays. (Tr. 205). Plaintiff testified that he does not have any friends at home. (Id.). Plaintiff stated that he plays with his

step-brother but he does not have any neighborhood friends. (Id.).

Plaintiff testified that the uncle who lives with him occasionally wakes him up in the morning. (Id.). Plaintiff stated that his uncle reminds him to take his medication. (Id.). Plaintiff testified that he takes his medication every day but he does not take any medication during school. (Id.).

Plaintiff testified that he knew that he was going to be on vacation from school the following week. (Tr. 206). Plaintiff stated that he had never heard this time off from school referred to as spring break until the morning of the hearing. (Id.).

Plaintiff testified that his chores consist of sweeping the living room floor, straightening clothes, straightening the couches, vacuuming, cleaning the toilet, cleaning the sink, cleaning the bathtub, sweeping the bathroom floor, washing the dishes, cleaning the kitchen table, filling the dog's water dish, and sweeping the kitchen floor. (Tr. 206-07).

Plaintiff stated that his uncle is staying with him although he is moving out soon. (Tr. 207). Plaintiff testified that he gets along with his uncle "sometimes." (Id.). Plaintiff explained that he argues with his uncle about schoolwork. (Id.). Plaintiff stated that his uncle forces him to sit down and complete schoolwork. (Id.).

Plaintiff testified that he does not play any sports. (Id.). Plaintiff stated that he plays basketball at school sometimes. (Id.). Plaintiff stated that he usually plays on the playground equipment at school. (Tr. 208). Plaintiff testified that he rides his bicycle up and down the street. (Id.). Plaintiff stated that he plays video games and reads Bible stories at home. (Id.). Plaintiff stated that he plays kickball with his step-uncles, who are twelve and thirteen years of age. (Id.).

B. Relevant Medical Records

Scott Trail, M.D. began treating plaintiff on December 1, 2003. (Tr. 130). Dr. Trail noted that plaintiff was struggling at school, was fidgety, and was not able to sit still. (Id.). Dr. Trail stated that plaintiff was aggressive at school, had a "short fuse," fought with his peers, and had been suspended on multiple occasions. (Id.). He also noted that plaintiff's grades had dropped that school year from As and Bs to Ds. (Id.). Dr. Trail diagnosed plaintiff with ADHD, with "anger issues." (Tr. 129). He prescribed Concerta[5] and therapy for plaintiff's anger issues. (Id.).

Plaintiff saw Dr. Trail again on March 22, 2004. (Tr. 126). Dr. Trail stated that plaintiff's behavior at school was negative, plaintiff was short-fused and plaintiff was easily upset. (Id.). Dr. Trail noted that he had tried increasing plaintiff's dosage of medication but this had resulted in a decreased appetite. (Id.). Dr. Trail's diagnosis was ADHD. (Id.). He changed plaintiff's medication to Adderall. (Id.).

On April 19, 2004, Dr. Trail noted that the Adderall was working. (Id.). He stated that plaintiff was sitting still and his temperament was better at school. (Id.). Dr. Trail's diagnosis was ADHD. (Id.). He continued plaintiff on Adderall. (Id.).

On July 19, 2004, Dr. Trail reported that the Adderall helped plaintiff initially, but plaintiff was currently acting up, experiencing difficulty focusing in summer school, and his grades had declined. (Tr. 125). He also noted that plaintiff was experiencing anger issues. (Id.). Dr. Trail

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[5]Concerta is a central nervous system stimulant indicated for the treatment of ADHD. See PDR at 1881-82.

diagnosed plaintiff with ADHD and possible bipolar disorder. (Id.). He increased plaintiff's dosage of Adderall and noted that plaintiff may also require a prescription for Risperdal. (Id.).

On September 13, 2004, Dr. Trail reported that plaintiff was still angry, had a short fuse, and his mood changed suddenly. (Tr. 124). He noted that plaintiff had attacked his brother because he lost a game. (Id.). Dr. Trail's diagnosis was ADHD and likely a mood disorder. (Id.). He continued plaintiff on Adderall and added Risperdal. (Id.).

On October 18, 2004, Dr. Trail stated that plaintiff seemed to improve on Risperdal. (Tr. 123). He noted that plaintiff was less angry, less explosive, and was behaving better at school. (Id.). Dr. Trail's diagnosis was ADHD and possible bipolar disorder. (Id.).

On December 6, 2004, Dr. Trail stated that plaintiff had less energy and was focusing better since he started taking Risperdal. (Id.). He also noted that plaintiff had been suspended from school the previous week. (Id.).

Dr. Trail completed a Child's Functional Assessment Form on January 24, 2005. (Tr. 119-122). Dr. Trail expressed the opinion that plaintiff had marked limitations in his ability to focus and maintain attention; carry through and finish activities; carry out instructions; control impulses; get along with other children; sleep; and cope with stress. (Tr. 120-22). He found that plaintiff had slight limitations in his ability to remain alert; work without needing task redirection; maintain pace; avoid being fidgety, overactive, or restless; avoid fighting with peers; ability not to be disruptive or talk out of turn; obey authority; tolerate differences; consider others' feelings and points of view; avoid harmful behaviors towards self; regard for safety rules; and cope with change. (Id.). Dr. Trail's diagnosis was ADHD and likely bipolar disorder. (Tr. 122). He

expressed the opinion that plaintiff had a Global Assessment of Functioning (GAF) of 50.[6] (Id.). Dr. Trail noted that he had been treating plaintiff for one year. (Id.). He stated that plaintiff's ADHD symptoms had been present long-term, for more than five years. (Id.). Dr. Trail stated that over the past year, plaintiff's anger, irritability, and temper had increased, and had variable response to medication adjustments. (Id.).

On February 14, 2005, Dr. Trail stated that since break, plaintiff had been getting more work done, but his irritability had worsened. (Tr. 117). He noted that plaintiff wanted to fight. (Id.). Dr. Trail's diagnosis was ADHD and likely bipolar disorder. (Id.). He increased plaintiff's dosage of Risperdal and continued the Adderall. (Id.).

C. School Records

Plaintiff attended Nathaniel Hawthorne Elementary School for the 2003-2004 and 2004-2005 school years. (Tr. 56-65). In the 2003-2004 school year, plaintiff earned Cs and Ds. (Tr. 60). At the end of the school year, plaintiff's teacher commented that plaintiff's growth in social maturity had continued to remain inconsistent. (Tr. 61). She stated that plaintiff required an increased amount of guidance and support, and his reading and written comprehension levels were below the expected levels for his age. (Id.). Plaintiff did not have any suspensions during the 2003-2004 school year. (Tr. 65).

In the 2004-2005 school year, plaintiff again earned Cs and Ds, with the exception of a B in science for two quarters and an F in writing for one quarter. (Tr. 57). On his progress report

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[6]A GAF score of 50 indicates "serious symptoms" or "any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job)." Diagnostic and Statistical Manual of Mental Disorders 32 (4th Ed. 1994) ("DSM IV").

for that year, plaintiff's teachers indicated that plaintiff was experiencing difficulties in reading, writing, and math. (Tr. 58). They noted that plaintiff was easily distracted, and was very inconsistent with his work. (Id.). They concluded that "the fourth grade team is very concerned with [plaintiff]'s progress. If great improvements are not made the possibility of retention exists." (Id.).

On December 7, 2004, plaintiff's mother, Ms. Patrick, wrote a letter to plaintiff's principal, Elliott H. Shostak, in which she requested a statement from Mr. Shostak indicating that plaintiff's behavior had improved over the last year. (Tr. 69). Ms. Patrick directed Mr. Shostak to express how different plaintiff's personality was as compared to the prior year. (Id.).

In a letter dated December 17, 2004, Mr. Shostak stated that he had noticed many positive changes in plaintiff as compared to the prior year. (Tr. 70). He stated that the prior year, plaintiff was constantly in trouble with his teachers, lacked focus, was not completing his work, had difficulty getting along with his classmates, and was not receptive to advice. (Id.). Mr. Shostak indicated that plaintiff had not been sent to his office the current year, nor had plaintiff's teachers raised concerns about plaintiff to him. (Id.). He noted that plaintiff appeared more calm when he observed him moving through the building. (Id.). Mr. Shostak also stated that plaintiff was making progress in his school work, even though his grades still require improvement. (Id.).

On January 6, 2005, plaintiff was suspended from school for three days for fighting and refusing staff request/directions. (Tr. 65).

The ALJ's Determination

The ALJ made the following findings:

1. Claimant was born on August 29, 1994, is a child under the age of 18, and is currently 10 years of age.

2. Claimant has never performed substantial gainful activity.

3. Claimant has the following medically determinable impairments which are "severe" within the meaning of 20 CFR § 416.924(c): an attention deficit hyperactivity disorder ("ADHD"); and a questionable bipolar disorder.

4. Claimant's impairments are not of a severity which medically meet or equal the severity of any impairment(s) listed in Part B of Appendix 1 to Subpart P, 20 CFR Part 404 ("Listing of Impairments"). Additionally, claimant's impairments are not functionally equivalent in severity to any listed impairments.

5. Claimant does not have "marked" limitations in two functional domains or "extreme" limitations in one functional domain.

6. Subjective complaints are considered credible only to the extent that they are supported by the evidence of record as summarized in the text of this decision.

7. Claimant is found to be "not disabled" within the meaning of the Act.

(Tr. 17).

The ALJ's final decision reads as follows:

> It is the decision of the Administrative Law Judge that, based on the application filed on December 1, 2003, claimant is not eligible for supplemental security income payments under Sections 1602 and 1614(a)(3)(C) of the Social Security Act, as amended.

(Id.).

Discussion

A. Standard of Review

Judicial review of a decision to deny Social Security benefits is limited and deferential to the agency. See Ostronski v. Chater, 94 F.3d 413, 416 (8th Cir. 1996). The decision of the SSA will be affirmed if substantial evidence in the record as a whole supports it. See Roberts v. Apfel,

222 F.3d 466, 468 (8th Cir. 2000). Substantial evidence is less than a preponderance, but enough that a reasonable mind might accept it as adequate to support a conclusion. See Kelley v. Callahan, 133 F.3d 583, 587 (8th Cir. 1998). If, after review, it is possible to draw two inconsistent positions from the evidence and one of those positions represents the Commissioner's findings, the denial of benefits must be upheld. See Robinson v. Sullivan, 956 F.2d 836, 838 (8th Cir. 1992). The reviewing court, however, must consider both evidence that supports and evidence that detracts from the Commissioner's decision. See Johnson v. Chater, 87 F.3d 1015, 1017 (8th Cir. 1996) (citing Woolf v. Shalala, 3 F.3d 1210, 1213 (8th Cir. 1993)). "[T]he court must also take into consideration the weight of the evidence in the record and apply a balancing test to evidence which is contrary." Burress v. Apfel, 141 F.3d 875, 878 (8th Cir. 1998). The analysis required has been described as a "searching inquiry." Id.

B. The Determination of Disability

A child is considered disabled if that child "has a medically determinable physical or mental impairment, which results in marked and severe functional limitations" and which lasts for a period of not less than twelve months. 42 U.S.C. § 1382c(a)(3)(C)(i),(ii). The Commissioner has established a three-step process for determining whether a child is disabled under the Social Security Act. See 20 C.F.R. § 416.924. Under the first step, it is determined whether the child was engaged in substantial gainful activity. If substantial gainful activity is being performed, then a finding of no disability is warranted. See 20 C.F.R. §§ 416.924(b). Next, it is determined whether the child's impairments are severe. See 20 C.F.R. §§ 416.924(c). If a severe impairment is found, the next issue is whether the child's impairment meets or medically equals a listed

impairment found in Appendix One to 20 C.F.R. 404. See 20 C.F.R. §§ 416.924(d); 20 C.F.R. pt. 404, subpt. P, App. 1. If it is determined that the impairment does not meet or medically equal a listing, then the final consideration is whether the child's impairment "functionally equals" a listed impairment. See 20 C.F.R. § 416.924(d).

An ALJ is to evaluate, in determining functional equivalence, a child's functional limitations in: (1) acquiring and using information, (2) attending and completing tasks, (3) interacting and relating with others, (4) moving about and manipulating objects, (5) caring for himself/herself, and (6) health and physical well-being. See 20 C.F.R. § 416.926a (b)(1)(i)-(vi). A medically determinable impairment or combination of impairments functionally equals a listed impairment if it results in "marked" limitations in two domains or an "extreme" limitation in one domain. See 20 C.F.R. § 416.926a(d).

A "marked" limitation is a limitation which is "more than moderate" but "less than extreme." 20 C.F.R. § 416.926a (e)(2)(i). A "marked" limitation can also be "equivalent to standardized testing with scores that are at least two, but less than three, standard deviations below the mean." Id.

An "extreme" limitation is "more than marked," and is given "to the worst limitations," although it need not necessarily mean a total lack or loss of ability to function. 20 CF.R. § 416.926a(e)(3)(i).

C. Plaintiff's Claims on Appeal

Plaintiff raises three claims on appeal of the Commissioner's decision. Plaintiff first argues that his due process rights were violated when the ALJ obtained and considered evidence that was

concealed from him in determining the credibility of his subjective complaints. Plaintiff next argues that the ALJ improperly relied on the "sit and squirm" test in determining his credibility. Plaintiff finally argues that the ALJ erred in rejecting the opinion of his treating physician, Dr. Trail. The undersigned will address plaintiff's claims in turn, beginning with his third claim.

1. Opinion of Dr. Trail

Plaintiff argues that the ALJ erred in rejecting the opinion of his treating physician, Dr. Trail. Plaintiff contends that the ALJ was required to re-contact Dr. Trail before rejecting his opinion.

In analyzing medical evidence, "[i]t is the ALJ's function to resolve conflicts among 'the various treating and examining physicians'" Johnson v. Apfel, 240 F.3d 1145, 1148 (8th Cir. 2001) (quoting Bentley v. Shalala, 52 F.3d 784, 787 (8th Cir. 1995)). "Ordinarily, a treating physician's opinion should be given substantial weight." Rhodes v. Apfel, 40 F. Supp.2d 1108, 1119 (E.D. Mo. 1999) (quoting Metz v. Halala, 49 F.3d 374, 377 (8th Cir. 1995)). Further, a treating physician's opinion will typically be given controlling weight when the opinion is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] record." Prosch v. Apfel, 201 F.3d 1010, 1012-1013 (8th Cir. 2000) (quoting 20 C.F.R. § 404.1527 (d)(2) (bracketed material in original). Such opinions, however, do "not automatically control, since the record must be evaluated as a whole." Id. at 1013 (quoting Bentley, 52 F.3d at 785-786). Opinions of treating physicians may be discounted or disregarded where other "medical assessments 'are supported by better or more thorough medical evidence.'" Id. (quoting Rogers v. Chater, 118 F.3d 600, 602 (8th Cir. 1997)).

Whatever weight the ALJ accords the treating physician's report, be it substantial or little, the ALJ is required to give good reasons for the particular weight given the report. See Holmstrom v. Massanari, 270 F.3d 715, 720 (8th Cir. 2001). If the opinion of a treating physician is not well supported or is inconsistent with other evidence, the ALJ must consider: (1) the length of the treatment relationship and the frequency of examination, (2) the nature and extent of the treatment relationship, including the treatment provided and the kind of examination or testing performed, (3) the degree to which the physician's opinion is supported by the relevant evidence, (4) consistency between the opinion and the record as a whole, (5) whether or not the physician is a specialist in the area upon which opinion is rendered, and (6) other factors which may contradict or support the opinion. See Rhodes, 40 F. Supp.2d at 1119; 20 C.F.R. § 404.1527 (d)(2)-(6).

The ALJ provided the following rationale for rejecting Dr. Trail's opinion:

> [o]verall, the undersigned finds that the opinion of Dr. Trail is not supported by the medical treatment (Exhibit F, pages 53, 55, and 56), or school records (Exhibit E, pages 42 and 49), as well as the December 17, 2004 letter from claimant's school principal (Exhibit E, page 37), all of which point to a significant improvement in claimant's behavior and ability to focus. Moreover, Dr. Trail's opinion renders an opinion on the ultimate issue of disability under the Social Security Act, all of which is reserved to the Commissioner (See 20 CFR § 416.927(e)). Accordingly, the above opinion of Dr. Trail is being accorded little weight.

(Tr. 15).

The undersigned finds that the ALJ erred in assigning little weight to Dr. Trail's opinion. Dr. Trail, plaintiff's treating psychiatrist, provided the only opinion regarding plaintiff's functional limitations. Dr. Trail had been seeing plaintiff approximately once a month for a year at the time he rendered his opinion. (Tr. 117-30). Dr. Trail is a specialist in the field of psychiatry, and

diagnosed plaintiff with ADHD and possible bipolar disorder. Dr. Trail prescribed psychotropic drugs for the treatment of plaintiff's psychiatric impairments. As such, Dr. Trail's opinion was entitled to substantial weight, absent inconsistencies in the record.

The ALJ indicated that she was discrediting Dr. Trail's opinion because it was not supported by the medical treatment or school records, which pointed to a significant improvement in plaintiff's behavior and ability to focus. (Tr. 15). The ALJ cited Dr. Trail's own treatment notes as support for this conclusion. Dr. Trail's April 19, 2004 treatment notes do indicate that the Adderall initially resulted in an improvement in plaintiff's behavior and ability to concentrate. (Tr. 126). On July 19, 2004, however, Dr. Trail reported that plaintiff was acting up again, experiencing difficulty focusing in school, experiencing anger issues, and his grades in school had declined. (Tr. 125). Dr. Trail increased plaintiff's dosage of Adderall at this time and noted that Risperdal may be necessary. (Id.). On September 13, 2004, Dr. Trail indicated that plaintiff was still angry, had a short fuse, and his mood changed suddenly. (Tr. 124). He also noted that plaintiff had attacked his step-brother because he lost a video game. (Id.). Dr. Trail added Risperdal at this time. (Id.). On October 18, 2004, Dr. Trail reported that plaintiff seemed to improve on the Risperdal. (Tr. 123). On December 6, 2004, Dr. Trail stated that although plaintiff was focusing better since starting the Risperdal, plaintiff had been suspended from school the previous week. (Id.).

In the Child's Functional Assessment Form he completed on January 24, 2005, Dr. Trail summarized that over the one-year period he had been treating plaintiff, plaintiff's anger, irritability, and temper had increased and had variable response to medication adjustments. (Tr.

122). This conclusion is supported by Dr. Trail's treatment notes, as summarized above. Dr. Trail expressed the opinion that plaintiff had marked limitations in his ability to focus and maintain attention; carry through and finish activities; carry out instructions; control impulses; get along with other children; sleep; and cope with stress. (Tr. 120-22). Dr. Trail listed plaintiff's diagnosis as ADHD and likely bipolar disorder. (Tr. 122). He assessed a GAF of 50, which is indicative of "serious symptoms" or "any serious impairment in social, occupational, or school functioning."[7] Dr. Trail's opinion is supported by his treatment notes, which reveal that despite initial improvements due to medication, plaintiff continued to experience significant behavioral problems.

Dr. Trail's opinion is also supported by plaintiff's school records. At the end of the 2003-2004 school year, plaintiff's teachers indicated that plaintiff required an increased amount of guidance and support, and that his reading and written comprehension levels were below the expected levels for his age. (Tr. 61). On his progress report for the 2004-2005 school year, plaintiff's teachers noted that plaintiff was experiencing difficulties in reading, writing, and math, and that plaintiff was easily distracted and very inconsistent with his work. (Tr. 58). They stated that the fourth grade team as a whole was very concerned with plaintiff's progress and noted that the possibility of retention existed if plaintiff did not greatly improve. (Id.). Notably, plaintiff was taking both Adderall and Risperdal at this time.

The ALJ seems to place great weight on the letter of plaintiff's principal, Elliott H. Shostak, in discounting Dr. Trail's opinion. (Tr. 70). In this letter, dated December 7, 2004, Mr.

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[7] DSM IV at 32.

Shostak indicated that he had noticed many positive changes in plaintiff's behavior as compared to the prior year. (Id.). This letter was written by Mr. Shostak in response to a request by plaintiff's mother, Ms. Patrick, on December 7, 2004, for a statement from Mr. Shostak indicating that plaintiff's behavior had improved. (Tr. 69). Plaintiff accurately points out that Mr. Shostak, as the school principal, did not have contact with plaintiff on a daily basis. In fact, Mr. Shostak indicates in his letter that his statement was based on observing plaintiff as he "move[d] through the building." (Tr. 70). Mr. Shostak's statement is inconsistent with the notes of plaintiff's teachers, who did have daily contact with plaintiff. Further, on January 6, 2005, a little over two weeks after Mr. Shostak provided his statement, plaintiff was suspended from school for three days for fighting and refusing staff directions. (Tr. 65). In light of these inconsistencies, Mr. Shostak's letter was entitled to little weight.

For all the foregoing reasons, the undersigned finds that the ALJ improperly discounted the opinion of Dr. Trail. The ALJ's decision to afford little weight to Dr. Trail's opinion is particularly problematic because there is no contrary medical opinion contained in the record. An ALJ "has the 'duty to develop the record fully and fairly, even if ... the claimant is represented by counsel.'" Boyd v. Sullivan, 960 F.2d 733, 736 (8th Cir. 1992) (quoting Warner v. Heckler, 722 F.2d 428, 431 (8th Cir. 1983)). This inquiry, however, is limited to whether the claimant was prejudiced or unfairly treated by the ALJ's development of the record. See Onstad v. Shalala, 999 F.2d 1232, 1234 (8th Cir. 1993). A consultative examination may be ordered when "the evidence as a whole, both medical and nonmedical, is not sufficient to support a decision on [a claimant's] claim." See 20 C.F.R. §§ 404.1519a (b), 416.919a (b). It has been held to be

reversible error for an ALJ not to order a consultative examination when such an evaluation is necessary to make an informed decision. See Haley v. Massanari, 258 F.3d 742, 749 (8th Cir. 2001). An ALJ, however, is "permitted to issue a decision without obtaining additional medical evidence so long as other evidence in the record provides a sufficient basis for the ALJ's decision." Anderson v. Shalala, 51 F.3d 777, 779 (8th Cir. 1999) (quoting Naber v. Shalala, 22 F.3d 186, 189 (8th Cir. 1994)).

In this case, by discrediting the opinion of Dr. Trail, no substantial medical evidence remains in the record that addresses plaintiff's functional capabilities. Without such medical evidence, the ALJ cannot make an informed decision about plaintiff's limitations. Accordingly, the undersigned recommends that this matter be reversed and remanded to the ALJ in order for the ALJ to accord the proper weight to the opinion of Dr. Trail and to order, if needed, additional medical information addressing plaintiff's functional capabilities. In light of Dr. Trail's diagnoses of "possible bipolar disorder" (Tr. 125, 123), and "likely bipolar disorder" (Tr. 122, 117), perhaps it can be determined at this time whether plaintiff in fact suffers from bipolar disorder.

2. Credibility Analysis

Plaintiff argues that the ALJ improperly relied upon a "sit and squirm" test in determining plaintiff's credibility. Related to this claim, plaintiff contends that his due process rights were violated when the ALJ obtained and considered evidence that was concealed from him in determining his credibility.

"While the claimant has the burden of proving that the disability results from a medically determinable physical or mental impairment, direct medical evidence of the cause and effect

relationship between the impairment and the degree of claimant's subjective complaints need not be produced." Polaski v. Heckler, 739 F.2d 1320, 1322 (8th Cir. 1984) (quoting settlement agreement between Department of Justice and class action plaintiffs who alleged that the Secretary of Health and Human Services unlawfully required objective medical evidence to fully corroborate subjective complaints). Although an ALJ may reject a claimant's subjective allegations of pain and limitation, in doing so the ALJ "must make an express credibility determination detailing reasons for discrediting the testimony, must set forth the inconsistencies, and must discuss the Polaski factors." Kelley, 133 F.3d at 588. Polaski requires the consideration of: (1) the claimant's daily activities; (2) the duration, frequency, and intensity of the pain; (3) precipitating and aggravating factors; (4) dosage, effectiveness and side effects of medication; and (5) functional restrictions. Polaski, 739 F.2d at 1322.

Under Polaski, an ALJ must also consider a claimant's prior work record, observations by third parties and treating and examining doctors, and the claimant's appearance and demeanor at the hearing. 739 F.2d at 1322. In evaluating the evidence of non-exertional impairments, the ALJ is not free to ignore the testimony of the claimant "even if it is uncorroborated by objective medical evidence." Basinger v. Heckler, 725 F.2d 1166, 1169 (8th Cir. 1984). The ALJ may, however, disbelieve a claimant's subjective complaints when they are inconsistent with the record as a whole. See Clark v. Chater, 75 F.3d 414, 417 (8th Cir. 1996).

Plaintiff contends that the ALJ improperly applied a "sit and squirm" test by considering plaintiff's conduct and demeanor at the hearing. "An ALJ is permitted to take notice of a claimant's demeanor during an administrative hearing, however the ALJ is not free to reject a

claimant's credibility on account of the claimant's failure to sit and squirm during the hearing." Cline v. Sullivan, 939 F.2d 560, 567-68 (8th Cir. 1991). See Miller v. Sullivan, 953 F.2d 417, 422 (8th Cir. 1992). As a justification for the rule, it has been noted that "[p]ain/credibility determinations necessarily require, to a large extent, the quantification of unquantifiable, subjective sensations of pain, a difficult task which invites undue reliance on personal observation. Any system of administrative adjudication which would attach determinative weight to appearances would be fraught with the potential for manipulation because outward manifestations of pain can easily be contrived by a calculating claimant, or suppressed by a hardy claimant." Cline, 939 F.2d at 568.

The ALJ stated as follows with regard to plaintiff's conduct at the hearing:

> [a]t the hearing, claimant appeared very polite and cooperative, and he was able to easily concentrate for the 30 minutes that he testified. Overall, claimant was appropriately responsive to questioning. It is further noted that the building guard reported that claimant, during the 30 minutes that he was in the waiting room prior to giving testimony, quietly colored in his coloring book.

(Tr. 10).

The ALJ does appear to assign significant weight to plaintiff's demeanor at the hearing. Plaintiff's demeanor at the hearing cannot constitute substantial evidence supporting the ALJ's decision. Defendant, however, contends that the ALJ pointed out inconsistencies in the record as a whole, including plaintiff's testimony, plaintiff's medical records, and plaintiff's mother's testimony, in determining the credibility of plaintiff's subjective complaints.

The ALJ first stated that plaintiff's subjective complaints were inconsistent with plaintiff's medical and school records, particularly after the adjustment and addition of medication. (Tr. 16).

As discussed above, however, the ALJ erred in analyzing the medical evidence. Plaintiff's medical and school records reveal that despite initial improvement due to the addition and adjustment of medication, plaintiff's behavioral problems persisted. Notably, plaintiff's most recent school record consists of a report that plaintiff was suspended for three days on January 6, 2005, for fighting and refusing staff request/directions. (Tr. 65). Further, in Dr. Trail's most recent treatment notes, dated, February 14, 2005, he notes that plaintiff's irritability had worsened and plaintiff appeared as if he wanted to fight. (Tr. 117). This evidence, which the ALJ does not address in her opinion, is not demonstrative of improvement in plaintiff's condition.

The ALJ also states that there were inconsistencies in the testimony of plaintiff's mother. She first notes that plaintiff's mother has not followed through with counseling or psychotherapy for plaintiff. (Tr. 16). Plaintiff's mother did testify that she only took plaintiff to one counseling session. (Tr. 199). She indicated that she did not continue counseling because she believed that the counselor was not helping plaintiff, as he only asked questions regarding her family history. (Id.). Plaintiff's mother's decision to discontinue counseling does not detract from the severity of plaintiff's impairments. Although plaintiff did not undergo further counseling, he regularly saw a psychiatrist and was prescribed psychotropic drugs.

The ALJ next notes that plaintiff's mother's testimony that plaintiff was violent and had no friends is inconsistent with plaintiff's testimony that he had two friends at school and that he played with relatives that are his age. (Tr. 14). The record reveals that plaintiff was suspended for fighting at school and that he attacked a relative with a knife when he lost a game. (Tr. 124). This evidence indicates that although plaintiff may play with other children, he has a tendency to

start fights and to become violent. As such, plaintiff's mother's testimony regarding plaintiff's difficulties getting along with other children is not inconsistent with plaintiff's testimony.

The ALJ finally notes that plaintiff's mother's testimony that plaintiff experiences difficulty concentrating is inconsistent with plaintiff's ability to play video games for long periods of time and plaintiff's ability to complete his household chores. Plaintiff's mother did testify that plaintiff could play video games for long periods of time. (Tr. 192). Although plaintiff's ability to play video games for long periods of time does appear inconsistent with plaintiff's claim of difficulty concentrating, plaintiff's allegations are supported by the remainder of the record, including his medical records, his school records, and his own testimony. With regard to plaintiff's chores, plaintiff's mother testified that plaintiff requires constant direction and supervision to complete his chores. (Tr. 188-90). Plaintiff's testimony was not inconsistent with his mother's testimony, as plaintiff merely listed his chores upon the prompting of the ALJ. (Tr. 206-07).

Plaintiff also objects to the ALJ's comment that the building guard reported that plaintiff quietly colored in his coloring book during the thirty minutes that he was in the waiting room prior to testifying at the hearing. (Tr. 10). Plaintiff contends that his due process rights were violated when the ALJ obtained and considered evidence that was concealed from plaintiff in determining plaintiff's credibility. Plaintiff also argues that the building guard's testimony was false, as plaintiff did not wait in the waiting room but rather waited with plaintiff's attorney's assistant in a separate room outside the view of any building guard.

Due process requires that a claimant be given the opportunity to cross-examine and subpoena the individuals who submit reports. Coffin v. Sullivan, 895 F.2d 1206, 1212 (8th Cir.

1990). See Richardson v. Perales, 402 U.S. 389, 402, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971). Here, plaintiff was not given the opportunity to cross-examine the building guard regarding his report to the ALJ. The ALJ then relied on this evidence, at least in part, in determining plaintiff's credibility. As such, the ALJ erred in obtaining and considering post-hearing evidence that was not provided to plaintiff.

In sum, the undersigned recognizes that each Polaski factor need not be discussed in depth, so long as the ALJ points to the relevant factors and gives good reasons for discrediting a claimant's complaints. See Dunahoo v. Apfel, 241 F.3d 1033, 1038 (8th Cir. 2001). In this case, the ALJ has not given sufficiently "good reasons" for discounting plaintiff's subjective complaints of limitations. The undersigned further finds that the ALJ improperly considered post-hearing evidence that was not provided to plaintiff.

Accordingly, the undersigned recommends that this matter be reversed and remanded to the Commissioner in order for the ALJ to more fully evaluate plaintiff's complaints under the standards set out in Polaski.

RECOMMENDATION

IT IS HEREBY RECOMMENDED that, pursuant to sentence four of 42 U.S.C. § 405 (g), the decision of the Commissioner be **reversed** and this case be **remanded** to the Commissioner for further proceedings consistent with this Report and Recommendation.

The parties are advised that they have eleven (11) days, until March 5, 2007, in which to file written objections to this Report and Recommendation pursuant to 28 U.S.C. § 636 (b) (1), unless an extension of time for good cause is obtained, and that failure to file timely objections may result in a waiver of the right to appeal questions of fact. See Thompson v. Nix, 897 F.2d 356 (8th Cir. 1990).

Dated this 21st day of February, 2007.

Lewis M. Blanton

LEWIS M. BLANTON
UNITED STATES MAGISTRATE JUDGE